No. 11-1520

In The
Supreme Court of the United States

HOOSIER RACING TIRE CORP.; DIRT MOTOR SPORTS, INC., d/b/a World Racing Group,

Petitioners,

v.

RACE TIRES AMERICA, INC., a Division of Specialty Tires of America, Inc.; SPECIALTY TIRES OF AMERICA, INC.; SPECIALTY TIRES OF AMERICA PENNSYLVANIA, INC.; SPECIALTY TIRES OF AMERICA TENNESSEE, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Product Liability Advisory Council ("PLAC") received consent to file this brief on behalf of itself and other organizations like the International Association of Defense Counsel (IADC) from Petitioners, Hoosier Racing Tire Corporation and Dirt Motor Sports, Inc., d/b/a World Racing Group. A letter indicating Petitioners' consent has been filed with the Clerk of Court. However, Respondents Race Tires America, Inc., Specialty Tires of America, Inc., Specialty Tires of America Pennsylvania, Inc., and Specialty Tires of America Tennessee, LLC did not consent to the filing of this brief. Accordingly, PLAC and IADC submit this motion for leave to file an *amici curiae* brief pursuant to Rule 37.2(b).

PLAC is a non-profit association representing corporate product manufacturers. The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. Members of PLAC and IADC are frequently involved in cases with high e-discovery costs, often involving millions of dollars per case. PLAC and IADC believe that the pending petition regarding whether e-discovery costs are recoverable under 28 U.S.C. § 1920 raises a significant and timely issue that pervades modern litigation. If permitted, PLAC and IADC will argue that *certiorari* should be granted to address the divergent approaches to e-discovery costs taken in district and circuit courts alike. A uniform approach to deciding which e-discovery costs are taxable is critical to

providing more certainty in litigation and creating positive incentives to parties to keep the scope of discovery reasonable. Moreover, e-discovery is different from traditional paper production in so many ways that courts are currently struggling with how to categorize e-discovery costs. This Court's guidance can help encourage a consistent set of policies in federal courts to address such costs.

PLAC and IADC are in unique positions to help the Court understand the impact of e-discovery and the importance of prevailing party cost-shifting. Product liability cases have been particularly affected by the advent of e-discovery, and e-discovery can cost millions of dollars in even a routine product liability case. PLAC and IADC have monitored developments relating to the impact of such costs, including technological advances and court sanctions, that help inform their brief.

Accordingly, the Product Liability Advisory Council and The International Association of Defense Counsel seek leave to file the accompanying *amici curiae* brief.

Dated: July 20, 2012

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Product Liability Advisory Council (PLAC) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 975 briefs as *amicus curiae* in both state and federal courts, including more than 75 in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Appendix A lists PLAC's corporate members.

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Petitioners have consented to the filing of this brief; Respondents have not. A motion for leave to file this brief is being concurrently submitted with this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

PLAC and IADC have an interest in having a uniform approach in federal courts to recovery of e-discovery costs as a prevailing party under 28 U.S.C. § 1920. As the studies discussed below indicate, the proliferation of electronic records combined with e-discovery obligations have brewed the "perfect storm" for many institutions involved in product liability litigation. As one RAND Institute for Civil Justice (ICJ) study revealed, e-discovery costs often are particularly high in product liability cases. A RAND study published this year described seven product liability cases with e-discovery costs ranging from $38,743 to $27,118,520, with six of the seven being more than $2 million. Nicholas M. Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* 17-18 (RAND Corp. 2012).

Questions of who bears such costs significantly affect litigation strategy, including the scope of

discovery sought from the other side and decisions concerning the timing and viability of settlement. The standards concerning recovery of e-discovery costs should not turn on which federal court is the forum, or whether the word "copy" appears in vendor invoices. PLAC and IADC members have a strong interest in securing a uniform federal approach to whether e-discovery expenses are taxable costs for a prevailing party under 28 U.S.C. § 1940 to avoid the inconsistent outcomes currently experienced in federal courts.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit's decision in this case assumed that e-discovery is just an electronic version of traditional production of paper documents. But as many who have followed e-discovery issues over the past decade know, e-discovery is vastly different from a traditional paper production.

Two major distinctions stand out. First, the sheer volume of electronic records in many cases precludes a typical production, in which attorneys and paralegals manually collect documents, analyze them for responsiveness, and review them for privilege. Because the sheer volume of electronically stored information increases significantly with each passing year, litigants must continually find new ways to manage this data, which often requires turning to technological solutions that cannot be easily categorized into traditional activities such as "collection" or "review."

Second, e-discovery includes a broad range of electronically stored information, including metadata and other information that is not apparent from the face of a document:

> For example, email has its own metadata elements that include, among about 1,200 or more properties, such information as the dates that mail was sent, received, replied to or forwarded, blind carbon copy ("bcc") information, and sender address book information. Typical word processing documents not only include prior changes and edits but also hidden codes that determine such features as paragraphing, font, and line spacing. The ability to recall inadvertently deleted information is another familiar function, as is tracking of creation and modification dates.

The Sedona Principles (Second Edition) 3 (Jonathan M. Redgrave ed., Sedona Conference 2d ed. 2007) (hereinafter "The Sedona Principles"). Capturing and copying such data for production likewise requires information technology solutions that are a stark departure from the traditional approach to production. Indeed, such information often cannot be captured in a documentary form; the layers of information embedded in electronic information can only exist and be transferred between computers and data systems. Productions involving electronic discovery components often result in no paper at all and instead are moved into massive databases, because the production can only properly be made using technology and in an electronic form.

Allowing federal courts to take divergent approaches as to who bears the cost of critical e-discovery tasks undermines federal policy to promote a consistent and predictable approach to cost-shifting in federal court litigation. It also runs counter to clear Congressional intent that federal law supply a uniform set of parameters to cost-shifting under 28 U.S.C. § 1920 in all federal courts. Accordingly, this Court should grant *certiorari* to address the Circuit split and supply a single answer to this critical question.

ARGUMENT

I.

This Court Often Has Granted Review To Consider Pervasive Litigation Issues Like The One Presented Here

This Court has frequently recognized the importance of granting *certiorari* and resolving splits among the circuits in cases involving cost and fee-shifting provisions. *See*, *e.g.*, *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997 (2012) (determining whether 28 U.S.C. § 1920 allowed Japanese plaintiff to charge costs of document translation); *Fox v. Vice*, 131 S. Ct. 2205 (2011) (reviewing whether a fee award for frivolous claims based on 42 U.S.C. § 1983 should include amounts spent litigating non-frivolous claims); *Astrue v. Ratliff*, 130 S. Ct. 2521 (2010) (reviewing whether award under prevailing party fee-shifting provision in 28 U.S.C. § 2412 could be offset

by claimant's debt to government); *Hardt v. Reliance Std. Life Ins. Co.*, 130 S. Ct. 2149 (2010) (reviewing whether plaintiff in Employee Retirement Income Security Act needs prevailing party status in order to receive fee award); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (reviewing whether a claim for costs of expert witness fees was limited by 28 U.S.C. §§ 1821 and 1920).

Such cases are suitable for review on *certiorari* because they present issues affecting a significant volume of the matters that are litigated in federal courts across the country. Moreover, the extent of fee- and cost-shifting possibilities in any given case directly affects a party's incentives to maintain litigation and consider potential settlement, and thus directly impacts every federal court's case management.

E-discovery costs – which have added millions to many product liability cases – readily fall within the spectrum of critical issues ripe for this Court's consideration. When "litigants do not bear the costs created by their discovery requests, their incentive to confine those requests in a procedurally efficient manner is significantly distorted. The inescapable result is substantial waste and inefficiency in the conduct of discovery." Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 569 (2001).

It is telling that a Lexis search for law review articles and CLE materials with the word "e-discovery" generates more than 3,000 hits, notwithstanding that this topic has garnered most of its attention only in

the past decade. Because of the frequency with which e-discovery issues may arise and e-discovery's pervasive impact on litigation and litigants, this Court should grant *certiorari* to ensure that federal courts follow a uniform approach regarding the availability of a cost award for e-discovery tasks.

II.

E-Discovery Presents Unique Tasks and Cost Categories For Which This Court's Guidance Is Needed In Applying 28 U.S.C. § 1920

The term "e-discovery" is an overly simplistic catch phrase, as it encompasses an enormously complex process. Litigants often must: locate electronically stored information ("ESI"); preserve ESI by overriding routine destruction or overwrite systems; gather ESI in a manner that ensures documentation of authenticity, chain of custody, and native format; process ESI so that it is in a reviewable format; review ESI for responsiveness and privilege; analyze ESI for patterns and relevance; and produce ESI to the other parties in a case. Pace & Zakarus, *supra*, at 11-12.

The Sedona Conference, which has prominently studied e-discovery issues and advised litigants and judicial officers alike, has observed that e-discovery distinguishes itself by "the sheer volume of electronic information," the multiplicity of documents created by computers saving different versions, the fact that emails often lack a coherent filing system, and

near- or completely-obsolete electronic storage systems frequently must be accessed to obtain and translate data for production. *The Sedona Principles* at 2 (citing *Byers v. Illinois State Police*, 53 Fed. R. Serv. 3d 740, No. 99 C 8105, 2002 WL 1264004, *31-33 (N.D. Ill. 2002)).

Other commentators have agreed. Because "ESI is retained in exponentially greater volume than hard-copy documents; is dynamic, rather than static; and may be incomprehensible when separated from the system that created it, . . . e-discovery [is] more time-consuming, more burdensome, and more costly than conventional discovery." Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 Harv. J. Law & Tec. 49, 51 (Fall 2007) (citing the Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S., Draft Minutes 22-23 (2005)). *See also* Redish, *supra*, at 592 ("[E]lectronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery."); Sasha K. Danna, *The Impact of Electronic Discovery on Privilege and the Applicability of the Electronic Communications Privacy Act*, 38 Loy. L.A. L. Rev. 1683, 1711-1716 (2005) (identifying as unique challenges in e-discovery the "sheer volume of data that can be stored electronically" leading to a higher risk of unintentional disclosure of privileged communications, the "difficulty of deletion and proliferation," metadata, and requirements to restore archived or deleted data).

As the Director of Judicial Education for The Sedona Conference and a former Federal Judicial Center attorney has observed:

> The fundamental difference between the way people create and communicate information on paper and on computers is that computer data is not tied to any artifact, like a piece of paper or a clay tablet. Computer data is digital, it's a sequence of zeroes and ones, positives and negatives, ons and offs, a stream of energy. When it is transmitted, there is no transmission of a physical object, like a piece of paper, but of energy, which takes patterns from one medium and places them on another, like a computer hard drive or a disk. No physical object is moved.
>
> This replication results in the buildup of massive volumes of data, mostly redundant but often containing subtle changes made by people or automated systems along the way. *That is why one printed document that may surface in conventional discovery, if it is for instance a word processed document or the result of some other automated system, may represent hundreds of copies or versions to be found on computers and on network servers and on disks and on tapes.*
>
> The fact that data can be sent to the next cubicle or around the world, to one person or to a million people, with the same click of a mouse creates a buildup of data entirely unlike anything that we have seen in human

> history. But computers have created whole new categories of data that do not have easy comparisons in the paper world.

Kenneth J. Withers *et al.*, *Panel Discussion: Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure: Conference on Electronic Discovery: Panel One: Technical Aspects Of Document Production And E-Discovery*, 73 Fordham L. Rev. 23, 24 (2004) (emphasis added).

To place the issue of volume in perspective, the RAND Institute for Civil Justice reported that ESI had grown at the rate of 30 percent annually from 1999 through 2002. James N. Dertouzos, *et al.*, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research* 1 (RAND Corp. ed. 2008). The exponential growth has continued, with the total amount of digital information increasing from 494 billion gigabytes in 2008, to 800 billion gigabytes (900 exabytes or 0.8 zettabytes) in 2009 or a 62 percent increase, and to 1.2 billion gigabytes (1,350 exabytes or 1.2 zettabytes) in 2010. Michael R. Arkfeld, *Proliferation of "Electronically Stored Information" (ESI) and Reimbursable Private Cloud Computing Costs*, LexisNexis, at 4 (2011). In 2010, the amount of new information created was equivalent to 9,990,000 libraries each containing 17 million books, each on par with the Library of Congress's collection. *Id.* Most businesses are doubling their enterprise data every three years. *Id.* (citing Rod Smith, *Internet Summit:*

Big Data, IBM, at 2 (2010)).[2] One technology market research firm reports that as of 2011, there were roughly 850 million corporate email accounts, and the typical corporate email user sent and received 105 email messages a day. The Radicati Group, Inc., *Email Statistics Report, 2011-2015*, at 3 (May 2011).[3]

Given that discovery in even a routine case could include review of hundreds of thousands of electronic documents and other ESI, automated techniques can be used to group near duplicates or related documents together and to facilitate a more accurate review for responsiveness and privilege. Pace & Zakarus, *supra*, at 50-52. Predictive or suggestive coding also is increasingly used in lieu of pure attorney review to score documents as to their anticipated responsiveness or privilege. *Id.* at 59. Such a process requires sophisticated analytic tools to capture word frequency and repeated sampling to identify the documents most likely to be responsive. Sharon D. Nelson & John W. Simek, *Hot Buttons: Predictive Coding: A Rose By Any Other Name*, 38 ABA Law Practice 4, July-August 2012, at 20. Key word searches with proximity capabilities (identifying responsive documents not just by the presence of key words, but where they are in relation to each other in the document) is yet

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[2] Available at http://www-01.ibm.com/software/ebusiness/jstart/downloads/RaleighInternetSummit2010.pdf.

[3] Available at http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf.

another tool that has been suggested. Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on "Information Inflation" and Current Issues in E-Discovery Search*, 17 Rich. J.L. & Tech. 9, 14, 21 (2011).

These information technology solutions cannot and do not entirely replace attorney review. Pace & Zakarus, *supra*, at 60-61. But they can enhance the efficiency and productiveness of attorney review, and reduce the number of attorneys and time needed to complete review. Baron, *supra*, at 33; Jason Krause, *E-Discovery: Still Searching*, 98 A.B.A.J. 1 (2012). Moreover, information technology solutions appear to reduce inconsistent results in the attorney review process that seem to be somewhat inherent in a large production. Pace & Zakarus, *supra*, at 56-58. A number of studies have concluded that computerized review overwhelmingly reduces inconsistencies in the production process and generally is as accurate as traditional review. *Id.* at 61-66 (citing Anne Kershaw, *Automated Document Review Proves Its Reliability*, 5 Digital Discovery and e-Evidence 11, at 10-12 (2005);[4] Thomas Barnett *et al.*, *Machine Learning Classification for Document Review*, Presentation at Workshop DESI, 12th International Conference on Artificial Intelligence and Law (ICAIL 2009) (June 8, 2009);[5] Herbert L. Roitblat, *et al.*, *Document Categorization*

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[4] Available at http://www.h5.com/pdf/autodocreview.pdf.

[5] Available at http://www.law.pitt.edu/DESI3_Workshop/Papers/DESI_III.Xerox_Barnett.Xerox.pdf.

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Finally, the very real threat of sanctions for an incomplete production, or failure to preserve evidence, means that corporate litigants have an incentive to use information technology consultants and vendors to be able to demonstrate their attempts to comply with e-discovery obligations. Preservation issues and scope of production often dominate, with significant sanctions and/or spoliation instructions having been granted in some cases. *See*, *e.g.*, *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 26 (D.D.C. 2004)

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[6] Available at http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2010/12/man-v-comp-doc-review.pdf.

[7] Available at http://www.equivio.com/files/files/Case%20Study%20-%20Am%20Law%20100%20Firm%20Uses%20Equivio%20Relevance%20to%20Find%20More%20Relevant%20Documents%20and%20to%20Find%20Them%20Faster.pdf.

[8] Available at http://www.umiacs.umd.edu/~oard/desi4/papers/grossman2.pdf.

(fining defendants $2.75 million for failure to preserve ESI); *see also Bray & Gillespie Mgmt., LLC v. Lexington Ins. Co.*, 259 F.R.D. 568 (M.D. Fla. 2010) (dismissing claim due to business plaintiff's failure to produce computerized data, in addition to $75,000 monetary sanction); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 647 (S.D. Tex. 2010) (providing adverse instruction and monetary sanctions for deleted emails and attachments); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010) (awarding rebuttable adverse inference and monetary sanctions for failure to preserve and conduct complete search for ESI); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 541 (D. Md. 2010) (awarding fees and costs and partial default judgment, plus two-year imprisonment for responsible individual, for data cover up). The possibility of sanctions for discovery conduct perceived to be less than "complete" or a failure to take standard industry approaches to preserving data drives up e-discovery costs that much higher.

In the new frontier we call e-discovery, the Third Circuit's approach of deciding cost recovery is untenable. In previous times, production was more neatly divided into attorney tasks and routine copying tasks. In today's world, production tasks are complex and multi-faceted, and information technology solutions loom large over the e-discovery process.

This Court can and should provide guidance on the question of whether the costs of such tasks are

recoverable by the prevailing party under 28 U.S.C. § 1920. Product liability cases, intellectual property litigation, and business-to-business disputes are particularly impacted by e-discovery, but the reality is that every litigant must apply Fed. R. Civ. P. 26 obligations to its emails, computers and data systems. The record and decision in this case provides an appropriate opportunity to address the issue, as the Third Circuit's framework posits a threshold question of whether e-discovery costs should be viewed through the lens of how close each cost is to "copying," or whether Congress intended a different, broader result when it amended 28 U.S.C. § 1920. PLAC and the IADC believe the latter to be true, and that courts across the country need clarity on the issue.

CONCLUSION

For the reasons stated above, *amici curiae* PLAC and IADC respectfully request that this Court grant the petition for *certiorari* here.

Dated: July 20, 2012

Respectfully submitted,

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APPENDIX A

Corporate Members of the Product Liability Advisory Council

as of 7/3/2012

Total: 100

3M

Altec, Inc.

Altria Client Services Inc.

Astec Industries

Bayer Corporation

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Boehringer Ingelheim Corporation

The Boeing Company

Bombardier Recreational Products, Inc.

BP America Inc.

Bridgestone Americas, Inc.

Brown-Forman Corporation

Caterpillar Inc.

CC Industries, Inc.

Chrysler Group LLC

Cirrus Design Corporation

CLAAS of America Inc.

Continental Tire the Americas LLC

Cooper Tire & Rubber Company

Crown Cork & Seal Company, Inc.

Crown Equipment Corporation

Daimler Trucks North America LLC

Deere & Company

The Dow Chemical Company

E.I. DuPont de Nemours and Company

Emerson Electric Co.

Engineered Controls International, LLC

Estee Lauder Companies

Exxon Mobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

GlaxoSmithKline

The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic Corporation of North America
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Stanley Black & Decker, Inc.

Subaru of America, Inc.

Techtronic Industries North America, Inc.

Teva Pharmaceuticals USA, Inc.

Thor Industries, Inc.

TK Holdings Inc.

The Toro Company

Toyota Motor Sales, USA, Inc.

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.